The Tidewater Group, Inc. *and* Laborers' International Union of North America, FPS & PTE, Local 571, AFL–CIO . Case 5–CA–28098

February 9, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 21, 1999, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting memorandum, and a brief in partial opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified and set forth in full below.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1), we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to bargain with the Union. We shall also order the Respondent to reinstate the group health insurance coverage for bargaining unit employees that was previously provided through Alliance Pro Inc. Employee Choice, or, if that insurance is no longer available, to provide substantially equivalent coverage. Finally, we shall order the Respondent to make unit employees whole for any losses they may have suffered because of the discontinuance of the health insurance, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

[1] There are no exceptions to the judge's disposition of all unfair labor practice allegations, including his finding that the Respondent violated Sec. 8(a)(5) and (1) by discontinuing payments for health insurance for the unit employees. Both the General Counsel and the Respondent agree, however, that the judge incorrectly found that these payments should have been made to Man-U Service, the Union's health benefit trust fund, rather than to Alliance Pro Inc. Employee Choice, the Respondent's own group health insurance carrier. We have revised the remedy, Order, and notice accordingly.

[2] We leave it to the compliance stage of this proceeding to determine whether, as alleged by the Respondent, the Union and the Respondent have reached an agreement which would satisfy the Respondent's remedial liability.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, The Tidewater Group, Inc., Washington, D.C., its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Refusing to bargain with Laborers' International Union of North America, FPS & PTE, Local 571, AFL–CIO as the exclusive collective-bargaining representative of an appropriate bargaining unit of the Respondent's employees, by unilaterally ceasing payments for those employees' group health insurance through Alliance Pro Inc. Employee Choice, a private insurance carrier.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time employees employed by the Respondent at its Carderock Naval Installation, Bethesda, Maryland location, excluding office clerical employees, probationary employees, guards and supervisors as defined in the Act.

(b) Reinstate the bargaining unit employees' group health insurance coverage by Alliance Pro. Inc. Employee Choice or, if that insurance is no longer available, provide substantially equivalent coverage.

(c) Make the employees whole, plus interest, for any losses they may have suffered because of the discontinuance of the health insurance coverage.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Carderock facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Laborers' International Union of North America, FPS & PTE, Local 571, AFL–CIO as the exclusive collective-bargaining representative of an appropriate unit of our employees, by unilaterally ceasing to make payments for group health insurance through Alliance Pro Inc. Employee Choice, a private insurance carrier.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time employees employed by the Respondent at its Carderock Naval Installation, Bethesda, Maryland location, excluding all office clerical employees, probationary employees, guards and supervisors as defined in the Act.

WE WILL reinstate the employees' group health insurance through Alliance Pro Inc. Employee Choice, or, if that insurance is no longer available, to provide substantially equivalent coverage.

WE WILL make employees whole, plus interest, for any losses they may have suffered because the health insurance was discontinued.

THE TIDEWATER GROUP, INC.

Angela S. Anderson, Esq., for the General Counsel.
Francis T. Coleman, Esq., of Washington, D.C., for the Respondent.
Michelle Simon, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on March 2, 3, and 4, 1999, at Washington, D.C., upon the General Counsel's complaint which alleged that the Respondent discharged all employees in the bargaining unit in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. It was also alleged that the Respondent threatened employees with discharge in violation of Section 8(a)(1) and engaged in certain activity amounting to a refusal to bargain in good faith in violation of Section 8(a)(5).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the employees were discharged for cause.

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended Order.

I. JURISDICTION

The Respondent is a Maryland corporation with an office and place of business in Clinton, Maryland, and is engaged in the business of providing custodial maintenance services to various entities in the Washington, D.C. area, including the Carderock Naval Installation at Bethesda, Maryland. In the course and conduct of this business, the Respondent annually performs services for the United States Government valued in excess of $50,000 and the Respondent will annually purchase and receive goods valued in excess of $5000 directly from points outside the State of Maryland. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Laborers' International Union of North America, FPS & PTE, Local 571, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The facts in this matter are largely undisputed. For many years, the Department of Navy has subcontracted the custodial work at its Carderock facility, which contracts are subject to competitive bid and are governed by the Service Contract Act, 41 U.S.C. §351 *et seq.* On March 16, 1998,[1] the Respondent replaced Jewell Industries, Inc. as the custodial contractor. Upon assuming the contact, the Respondent interviewed, and hired some of the incumbent employees as well as Supervisor-Deborah Tabron to be the Respondent's site manager. According to the testimony of Louis Brown, the Respondent's executive vice-president for administration and operations, they hired 10 new employees and 10 who had worked for Jewell. However, a letter from Brown to the Union dated May 5 lists but 15 employees. The dues-deduction printout for February lists 26 employees. Comparing these two documents, it appears that the Respondent hired 12 Jewell employees and 3 new ones.

The custodial employees comprise a bargaining unit which is represented by the Union. The Union and Jewell had a collective-bargaining agreement executed on August 18, 1995, to be effective from June 1, 1995, to November 15, 1998.

Brown conducted an orientation meeting for employees during which, according to the undisputed testimony of Mamie Burnett, he told them everything would remain the same except for vacations. He told them that the company could not afford to pay 4 weeks vacation—"no company could do that when they first came in."

The Union's business manager, Cidalia Danahy, testified that she learned in March that the Respondent had taken over the Carderock custodial contract. She therefore wrote Brown stating that the Union represented a majority of the bargaining unit and demanding recognition.

As indicated, the Union's agreement with Jewell contained a union-security clause. All employees in the bargaining unit were members of the Union and their dues were deducted pursuant to checkoff authorizations. However, no such deductions were made by the Respondent, nor did the Union seek to collect dues until it completes an agreement with the Respondent. Thus, dues were paid by the unit employees for February (pursuant to checkoff) but not thereafter.

By letter of April 21, Ms. Danahy was informed by the Respondent's then attorney that recognition would be granted upon verification of authorization cards. On May 6, Brown granted recognition. Thereafter, the parties began negotiations for a collective-bargaining agreement, with the Union being represented by labor consultant Joseph Danahy, Cidalia Danahy's husband.

[1] All dates are in 1998, unless otherwise indicated.

The parties met July 15, August 5 and 27, and have had subsequent meetings in 1999. Initially, according to Danahy, the Respondent proposed to reduce wages and health benefits. Danahy noted that under the Service Contract Act, the Respondent was required to keep the wages and benefits at the same level paid by Jewell for 1 year, or until March 16, 1999. Thereafter, wages could be changed; however, he stated in negotiations that more than likely, if a wage increase was negotiated, the Government would reimburse the Respondent.

At the August 5 meeting, the Respondent agreed that it would keep the wages and health benefits at the previous level and this was put into the tentative agreement. And the Respondent did continue paying the wage rate under the Jewell contract; however, insurance was paid only through June. Apparently, though it is unclear, some employees were not granted vacations to which they would have been entitled had their former service at Carderock been considered.

On August 13, Brown and the Respondent's President and owner, Westbrook Reginald Alexander I, were called by the Navy's contract administrators to discuss performance problems. Brown and Alexander were told to fix the problem. They were called again on August 21 and told that they were not getting the work done and needed to fix the situation. A "cure" letter was prepared by Leon Butcher, the contract specialist who had overall responsibility for administering the contact. At this meeting, LaVonne Jinks-Umstead, the supervisory contract specialist, told Alexander to come up with a plan to solve the problem, and she gave him until August 25. If he failed to do so, she would issue a "cure" letter and initiate a default action.

In order to have funds to meet operational expenses until such time that the Government would pay its invoices, the Respondent obtained funds through a factoring house. Although Jinks-Unstead testified that Butcher did not have the authority to instruct the factoring house to deduct anything from the August invoice, he did so. Thus on Friday, August 28, Brown was informed that the invoice had been reduced by $3464.92. This meant that somewhere the Respondent would have to find about $3000 in order to meet its payroll on August 31.

Over the weekend, Alexander and Brown discussed possible solutions to their problem, with Brown recommending that the entire work force be discharged, on grounds that they could not pinpoint exactly who was at fault; and, they would be able to assemble a new work force quickly from the 50 or so applications they had on file. On Monday, August 31, Alexander agreed and at 4 p.m. that day met with the employees and told them they were terminated. Each received a letter to that effect, and another stating that the reason for termination was "Work Slowdown, causing harm to the Company."

B. Analysis and Concluding Findings

1. Threat of discharge

It is alleged that on August 28, Tabron told employees that the Respondent would lay off all the employees because they brought the Union in.[2] Hazel Macon testified to this allegation:

[2] The complaint was amended to allege the statement was made by Tabron rather than Octavio Canas.

> Well, me and my manager (Tabron) was in the office talking. It was on that Friday (August 28). And we had a little talk. And then she told me, well, I told you all the man wasn't making any money.
>
> So I said, well, that's not our fault.
>
> She said, but you all voted the union in on that man. That man is not making no money. And now he's going to terminate all of you all.

Tabron credibly denied that she made such a statement to Macon, or anyone else. She further testified that she was not aware that the employees would be terminated until the afternoon of August 31. There is no evidence, or any basis to infer, that she had any prior knowledge of the discharge decision, or was involved in any way in the decisional process. On balance, I credit Tabron over Macon and conclude that the statement attributed to Tabron was not made. Further, this statement is not consistent with the overall facts of this matter. If true, it might tend to show antiunion animus and a discriminatory motive in terminating the employees, but not necessarily, given that she had nothing to do with the termination decision. *California Cooperative Creamery,* 290 NLRB 355 (1988).

2. The termination

It is alleged that the Respondent's termination of all employees in the bargaining unit was violative of Section 8(a)(3) because they had assisted the Union and other concerted activities and to discourage them from doing so. A preponderance of credible evidence does not support this allegation.

There is little persuasive evidence of animus against the Union. To the contrary, the Respondent voluntarily recognized the Union upon a card check, and on request commenced bargaining, which tend to show lack of such animus. *Sun Coast Foods,* 273 NLRB 1642 (1985). While the Respondent initially sought a wage and benefits reduction, it soon came off that proposal. In any event, I do not find the Respondent's initial proposal to be so outrageous as to imply animus.

While those employees who had worked for Jewell were members of the Union, their membership had lapsed due to nonpayment of dues. The Union's policy is not to require employees to pay dues until a collective-bargaining agreement is reached. Thus, at the time of the termination, none of the bargaining unit employees was a union member and nothing, except the particular individuals in the bargaining unit, has changed. The Respondent still recognizes the Union as the representative of its employees and is negotiating a collective-bargaining agreement.

From the General Counsel's witness Jinks-Umstead, it is clear that by August the Respondent was not satisfactorily performing under its contract with the Government, and, unless there were immediate and dramatic changes, a default action would be initiated. Thus the chain of events leading to the terminations on August 31 began with the meeting of August 13 when Jinks-Umstead called in Alexander and Brown and cumulated on August 28 when the Respondent learned that the invoice, per instructions from Butcher, had been reduced $3464.92.

It may well be that the Respondent tried to get by with too few employees, having 15 as opposed to the 26 used by Jewell. However, for purposes of this case, it does not matter whether the source of the problem lay with the employees or with management—whether employees were not working to their potential or whether the Respondent had hired too few for the work to be done adequately. It is not within the province of the National Labor Relations Board to determine who caused the problem, or the general fairness of the Respondent's decision to blame the employees and terminate them all. The issue here is only whether the Respondent's action was an unfair labor practice; that is, whether it was motivated by antiunion considerations or because the employees engaged in protected concerted activity, or to discourage them from doing so.

It is clear, and I conclude, that but for action initiated by the Government, there would have been no termination of employees on August 31. The General Counsel seems to argue that notwithstanding the Government's role in this affair, since the Respondent was in negotiations with the Union, and initially sought a wage reduction, there must have been some antiunion motive in the August 31 action. Further, the General Counsel relies on the alleged statement by Tabron to Macon on August 28. I have concluded that Tabron did not make the threat alleged, and absent that, there is simply no evidence of antiunion animus, and even if Tabron did make the statement attributed to her, I doubt it would impute animus to the Respondent.

Accordingly, l conclude that the Respondent was not motivated by the antiunion considerations, or sought to discourage employees from engaging in union or other protected concerted activity when it terminated all unit employees on August 31.

3. The refusal to bargain

It is alleged that the Respondent violated Section 8(a)(5) of the Act by (a) unilaterally ceasing health insurance coverage for unit employees, (b) insisted to impasse that wages and benefits be excessively reduced from current levels, and (c) by its overall conduct, including the above, failed to bargain in good faith.

Pursuant to the Union's collective-bargaining agreement with Jewell, effective November 16, 1997, the company was to pay on behalf of each employee $1.65 per hour to Man-U Service Contract Trust Fund for health benefits coverage. While the Respondent had another health plan for its employees, it is unclear whether and to what extent Carderock employees were covered. The Respondent contends that during negotiations, it agreed to make the $1.65 per hour payment to the Union's health plan, but it has not done so. Whatever coverage the employees had lapsed at the end of June. The Respondent's failure to make health care contributions is alleged a unilateral change in a mandatory subject of bargaining and violative of Section 8(a)(5).

Although the Respondent was not bound by its predecessor's collective-bargaining agreement, having recognized the Union as the representative of its employees, it could not lawfully alter those terms of employment which are mandatory subjects of bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962). No doubt payment into a trust for health benefits is a mandatory subject. Thus, by failing to make the appropriate payments to Man-U Service without bargaining to impasse the Respondent violated Section 8(a)(5) of the Act.

Though the Respondent is clearly a different employer from Jewell, or other predecessors, and could treat employees as new hires, an established term of employment is the Service Contract Act requirement that time accrued with predecessors be counted for vacation benefits. As with the Respondent's attempt to negotiate a wage reduction, its apparent refusal to pay vacation benefits based on the employee's past service seems to suggest ignorance of the Service Contract Act. This, of course, is not an unfair labor practice, however, the unilateral altering of a mandatory subject of bargaining is. Failure to pay accrued vacation benefits to employees would be unlawful. *E.g., Virginia Sportswear, Inc.,* 226 NLRB 1296 (1976). However, there are no facts concerning whether any particular employee was denied vacation benefits. Nor was such a denial specifically alleged to be a violation of the Act. Therefore, the suggestion by Brown that 4 weeks vacation would not be paid is not included in the remedy.

I also conclude that the evidence fails to sustain the allegation that the Respondent insisted to impasse that wages and benefits be excessively reduced from the current levels. The Respondent did make an initial proposal that wages and benefits be reduced. However, during negotiations it was explained to Brown that the Service Contract Act required that for 1 year the wages and benefits remain as set and he agreed that the Respondent would do so. Such was written into the Respondent's proposal.

The mere fact that one makes a proposal during negotiations does not mean it has been insisted on to impasse or that by making an unacceptable proposal there has been a violation of Section 8(a)(5). I shall recommend that paragraph 11(b) be dismissed.

Similarly, I find insufficient evidence that the Respondent's overall conduct in negotiations amounted to a predisposition not to bargain in good faith. The parties met, negotiated and reached agreement on many issues. While they remained apart on some major items, I cannot find, in the Respondent's overall conduct, the requisite bad faith to support a finding of refusal to bargain in good faith. Accordingly, I shall recommend that paragraph 11(c) be dismissed.

REMEDY

Having found that the Respondent has committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the unfair labor practice found was a violation of the Respondent's bargaining duty, I shall recommend that it be ordered to bargain with the Union in good faith.

[Recommended Order omitted from publication.]